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No. 82-642

IN THE

Supreme Court of the United States

October Term, 1982

ANDRE FRANKS,

Petitioner

v

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

	Page
Menke v. Southern Ry. Co., 603 F. 2d 1281 (7th Cir., 1979)	3, 4
Ragsdell v. Southern Pacific Trans. Co., 688 F. 2d 1281 (9th Cir., 1982)	1, 2, 3
Robak v. Pennsylvania R. R. Co., 178 F. 2d 485 (3rd Cir., 1949)	3

REPLY BRIEF

On September 28, 1982, the Court of Appeals for the Ninth Circuit decided *Ragsdell v. Southern Pacific Trans. Co.*, which was reported shortly after the plaintiff filed his Petition for a Writ of Certiorari. Ragsdell sued under the Federal Employers' Liability Act and the Safety Appliance Act for injuries suffered in the course of his employment. He appealed from a jury verdict against him, claiming that the district court erred in refusing to give his requested instruction on the railroad's duty under the Federal Employers' Liability Act to provide him a safe place to work. The Court of Appeals for the Ninth Circuit held that the failure to instruct the jury regarding the railroad's duty under the Act to provide a reasonably safe place to work was reversibly erroneous. *Id.* at 1283. The Court went on to suggest that the following jury instruction is ordinarily appropriate in a case under the Federal Employers' Liability Act:

> An employer such as Southern Pacific has a continuous duty to exercise ordinary care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery and appliances with which to work. In the absence of knowledge or notice to the contrary, an employee may rely on the assumption that the employer has exercised such care. *Id.* at 1283.

Ragsdell answers affirmatively the question presented by this Petition for a Writ of Certiorari; that it is prejudicial error for the court to refuse to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable thereto in a case brought under the Act.

In the case at bar, the Learned Trial Judge did not instruct the jury on the defendant's responsibilities to plaintiff under the Federal Employers' Liability Act. Nowhere in the charge is there any reference to defendant's duty to provide plaintiff with a safe place to work, and with safe and suitable tools, machinery and appliances with which to work. The Judge's refusal to give these instructions as requested by the plaintiff (Petitioner's Brief at A8-A9, A34-A35) is reversible error under *Ragsdell.*

Defendant asserts that the following portion of the Judge's charge properly instructed the jury on defendant's duties:

> Now, Mr. Franks, through his attorney, Mr. Hankin, and his witnesses, Mr. Franks argues, in effect, that the defendant, Amtrak, first of all, failed to give Mr. Franks a safe place to work, namely, that allegedly defective machine, the tie plugger and, second, failed to give Mr. Franks adequate supervision and training with respect to how to maintain and repair that tie plugger, that assertedly unsafe tie plugger. (Respondent's Brief at 6-7; Petitioner's Brief at 19).

This is not an instruction on the law governing this case. It simply reiterates plaintiff's theory of liability, which the jury had been told that it did not have to accept. The statutory basis of plaintiff's contention was never explained to the jury.

The only other instruction which the Learned Trial Judge gave regarding defendant's duties was during his concluding remarks on the meaning of negligence. The Judge stated:

> I charge you that Amtrak, as Mr. Frank's employer, is not a guarantor of his safety nor does it

> owe to Mr. Franks the highest possible duty of the most demanding care. It owes to Mr. Franks a *duty of reasonable care;* that is to say, it must not fail to do what a reasonable person would do in like circumstances, to insure, not in the sense of guarantee, but simply to make provision for the safety of somebody engaged in the occupation which Mr. Franks was engaged in. (Petitioner's Brief at A33-A34; Respondent's Brief at 7) (emphasis supplied).

This is an erroneous statement of the law under the Federal Employers' Liability Act. The employer's duty to provide a safe place to work is broader than the general duty to use reasonable care. *Ragsdell, supra* at 1283. The Learned Trial Judge's failure to define negligence broader than that at common law was prejudicial error. (See Petitioner's Brief at 11).

Defendant cites *Robak v. Pennsylvania R. R. Co.*, 178 F. 2d 485 (3rd Cir., 1949) and *Menke v. Southern Ry. Co.*, 603 F. 2d 1281 (7th Cir., 1979), for the proposition that there is no requirement that a federal jury must be charged by reading the formal language of the applicable statute (Respondent's Brief at 2-3). Defendant has misconstrued these cases. In *Robak*, the Court held that the trial judge is not required to read *points for charge* which are couched in formal language. *Id.* at 486.

The significance of *Robak* insofar its application to the instant case is that the trial judge did tell the jury that recovery was sought under the Federal Employers' Liability Act. *Id.* at 486. The Learned Trial Judge did not mention the Act in the case at bar. Contrary to defendant's contention, the Judge's reference to the Act during the course of trial (Respondent's Brief at 9) does not constitute an instruction and is not sufficient.

In *Menke*, the Court held that the trial court's reliance upon statutory language was not prejudicial error when one of the issues in the case, as it is in the case at bar, is whether the statute was breached. *Id.* at 1284. Plaintiff does not contend that jury instructions should employ cumbersome, formalistic statutory language. On the other hand, the law which is embodied in a statute cannot be ignored, as it was in the instant case.

For the reasons set forth above and in the Petition, it is respectfully requested that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted,

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